TIONG NAM TRADING & TRANSPORT (M) SDN BHD A

v.

COMMERCIAL UNION ASSURANCE (MALAYSIA) SDN BHD B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
[CIVIL APPEAL NO: W-02-212-2002] C
6 AUGUST 2008

CIVIL PROCEDURE: *Third party proceedings - Indemnity - Claim by defendant against insurance company - Defendant reached settlement agreement with plaintiff - Whether insurance company still liable to indemnify defendant - Whether settlement agreement must be consented to by insurance company* D

INSURANCE: *Double insurance - Different policies covering same subject matter and risk - Interests covered by policies not the same - Whether case of double insurance* E

INSURANCE: *Subrogation - Right of - Whether plaintiff's insurer could sue defendant for damaged goods - Whether defendant should be indemnified in the circumstances* F

INSURANCE: *Claims - Indemnity - Claim by defendant against insurance company in third party proceedings - Defendant reached settlement agreement with plaintiff - Whether insurance company still liable to indemnify defendant - Whether settlement agreement must be consented to by insurance company* G

This was an appeal by the defendant (the appellant herein) against the learned judge's dismissal of its claim against a 2nd third party (the respondent herein) in third party proceedings commenced in the court below. The facts showed that the plaintiff in the court below was a manufacturer of power cables whilst the defendant was a carrier and bailee of goods for hire and reward. The said parties entered into an agreement whereby the defendant agreed to carry eight drums of the plaintiff's cables from the plaintiff's factory to a designated project site. During delivery, the lorry transporting the cables overturned and the said cables were H I

damaged. As a result thereof, the plaintiff suffered losses and claimed a sum of RM480,035.80 as damages against the defendant. Both parties were covered by insurance policies at the material time. The defendant commenced third party proceedings against the driver of the lorry, *ie*, the 1st third party, and its insurance company, the said 2nd third party, for indemnification. It transpired that the plaintiff and the defendant negotiated a settlement agreement and a consent judgment was recorded for the sum of RM100,000 as damages and RM10,000 as costs. The defendant then withdrew its claim against the 1st third party. In respect of the 2nd third party, the parties agreed to limit their dispute to the application of Condition 2 and Memo A of the policy in question on double insurance claims. The learned judge, however, dismissed the defendant's claim against the 2nd third party after considering the submissions. Hence, the defendant's appeal herein.

Held (allowing the appeal)
Per Abdul Malik Ishak JCA:

(1) The consent judgment entered between the plaintiff and the defendant did not bar the defendant from suing the 2nd third party under the insurance coverage taken by the defendant with the 2nd third party. (para 25)

(2) The insurance coverage taken by the plaintiff was entirely different from that taken by the defendant. They were two diametrically different policies. While the defendant's interest as a bailee was protected while conveying the cables, the interest of the plaintiff as a bailor and as the owner of the cables was also protected. (para 26)

(3) The terms and conditions of the insurance coverage between the defendant and the 2nd third party did not deprive the plaintiff's insurer's right of subrogation which it acquired. Although the plaintiff was indemnified by its insurer, there was no restriction either in law or in equity for the plaintiff's insurer to sue the defendant in the plaintiff's name by way of subrogation. (para 30)

Per KN Segara JCA:

(1) The obligation to indemnify the insured arises once the liability is incurred and the amount of compensation or the damages to the third party is determined in one way or another (see the Supreme Court case of *Malaysia National Insurance Sdn Bhd v. Lim Tiok*). (para 59)

(2) The trial judge clearly misdirected himself in concluding that the settlement reached between the defendant and the plaintiff required the consent of the 2nd third party based on the decision in *Post Office v. Norwich Union Fire Insurance Society Ltd*. The English Court of Appeal in that case did not impose a condition that the agreement between the insured and the injured party must be consented to by the insurance party before any liability can be imposed on the insurance company on an indemnity claim. The insurance company therein relied on an express condition in the insurance policy requiring the consent of the insurance company to any "agreement" between the insured and the injured. In the present case, there was no such express condition requiring consent. It followed that the 2nd third party could not contend that it was not liable to indemnify the defendant since it did not consent to the said settlement. (paras 60, 61 & 64)

(3) The learned judge did not make any finding on the construction and scope of Condition 2 and Memo A of the policy in question. The courts have interpreted and construed that such provisions were in effect aimed primarily at preventing double insurance claims. In the present appeal, the said Condition 2 and Memo A must be interpreted to apply to cases where the same insured had taken out two different policies to cover the same subject matter and risk. It was not disputed that the subject matter (goods belonging to the plaintiff, *ie*, the eight drums of cable) and the risk (accident) covered by the policy taken out by the plaintiff and the defendant were the same. The interest covered by the policy taken out by the defendant was to provide cover for loss or damage to goods as common carrier (bailee) whereas the plaintiff's interest in the policy taken out by it was to provide cover as owners of the goods (bailor). It followed that the interests covered by the two policies were not the same. (paras 65 & 69)

(4) The defendant as bailee was liable to compensate the plaintiff as bailor the value of the goods damaged in the accident. There was no dispute that the plaintiff had taken its own policy for its own security and not to indemnify the defendant against the claim of the plaintiff. Although the plaintiff had been indemnified by its own insurer, there was no bar in law or equity for the plaintiff's insurer from availing itself of the right to sue the defendant in the plaintiff's name by way of subrogation. The defendant should not be prejudiced by the mere fact that the plaintiff without the defendant's privity had been minded to effect another insurance upon the said goods. It would be unjust and inequitable to deprive the defendant of the benefits under the policy in question purely because the plaintiff had taken out its own policy to cover the same goods with another insurance company. (paras 70, 71 & 72)

[Judgment for defendant's claim for indemnity against 2nd third party in the sum of RM110,000 together with interest at 8% per annum.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan (perayu disini) terhadap keputusan yang arif hakim kerana menolak tuntutannya terhadap pihak ketiga kedua (responden di sini) dalam satu prosiding pihak ketiga yang dimulakan di mahkamah di bawah. Plaintif di mahkamah di bawah adalah pengeluar kabel letrik sementara defendan adalah sebuah syarikat pengangkutan dan pembawa barang yang mengambil upah untuk mengangkut barang-barang. Fakta menunjukkan bahawa pihak-pihak telah memeterai satu perjanjian di mana defendan bersetuju untuk membawa lapan drum kabel plaintif dari kilang plaintif ke satu tempat tertentu. Bagaimanapun, lori pembawa tersebut telah terbalik ketika dalam perjalanan sekaligus menyebabkan kerosakan kepada kabel-kabel. Akibatnya, plaintif menuntut gantirugi dari defendan sebanyak RM480,035.80. Tidak dinafikan bahawa kedua-dua pihak pada waktu material dilindungi oleh polisi insurans mereka masing-masing. Defendan kemudian memulakan prosiding pihak ketiga terhadap pemandu lori, iaitu pihak ketiga pertama, serta syarikat insurannya, iaitu pihak ketiga kedua, bagi menuntut indemnifikasi. Sementara itu, plaintif telah berunding dengan defendan untuk satu penyelesaian bersama dan berikutnya satu penghakiman persetujuan telah direkodkan untuk jumlah RM100,000 sebagai gantirugi dan RM10,000 sebagai kos. Defendan kemudian menarik balik tuntutannya terhadap pihak

ketiga pertama. Berhubung pihak ketiga kedua, pihak-pihak bersetuju untuk menghadkan pertikaian mereka kepada permohonan Syarat ke 2 dan Memo A polisi berkenaan yang menyangkuti soal tuntutan insurans berganda. Yang arif hakim bagaimanapun menolak tuntutan defendan terhadap pihak ketiga kedua selepas menimbang hujah-hujah. Maka defendan merayu.

Diputuskan (membenarkan rayuan)
Oleh Abdul Malik Ishak HMR:

(1) Penghakiman persetujuan yang dimasuki oleh plaintif dan defendan tidak menghalang defendan dari mendakwa pihak ketiga kedua di bawah perlindungan insurans yang diambil oleh defendan dengan pihak ketiga kedua tersebut.

(2) Perlindungan insurans yang diambil oleh plaintif adalah amat berbeza dari apa yang diambil oleh defendan. Ia merupakan dua polisi yang ketara berbeza di antara satu sama lain. Sementara kepentingan defendan selaku bailee dilindungi semasa menghantar kabel, kepentingan plaintif selaku bailor dan sebagai pemilik kabel turut dilindungi.

(3) Terma-terma dan syarat perlindungan insurans di antara defendan dan pihak ketiga kedua tidak menolak hak subrogasi penanggung insurans plaintif. Walaupun plaintif ditanggungrugi oleh penanggung insuransnya, tiada halangan sama ada di sisi undang-undang mahupun ekuiti untuk penanggung insurans plaintif mendakwa defendan atas nama plaintif melalui kaedah subrogasi.

Oleh KN Segara HMR:

(1) Obligasi untuk menanggung rugi pengambil insurans berbangkit sebaik liabiliti menjadi tertanggung dan jumlah pampasan atau gantirugi kepada pihak ketiga dapat dipastikan melalui sesuatu cara atau kaedah (lihat kes Mahkamah Agong *Malaysia National Insurance Sdn Bhd v. Lim Tiok*).

(2) Hakim bicara jelas telah tersalah arah akan dirinya dalam merumuskan bahawa penyelesaian yang dicapai di antara defendan dan plaintif memerlukan persetujuan pihak ketiga kedua berdasarkan keputusan kes *Post Office v. Norwich Union Fire Insurance Society Ltd*. Mahkamah Rayuan Inggeris dalam kes tersebut tidak mengenakan syarat bahawa perjanjian di

antara pengambil insurans dan pihak yang tercedera hendaklah dipersetujui oleh pihak insurans sebelum sebarang liabiliti boleh berbangkit terhadap syarikat insurans dalam sesuatu tuntutan indemniti. Syarikat insurans dalam kes tersebut bergantung kepada satu syarat ekspres di dalam polisi insurans yang memerlukan persetujuan syarikat insurans terhadap mana-mana "perjanjian" di antara pengambil insurans dan pihak yang tercedera. Dalam kes semasa, tidak ada syarat ekspres yang menuntut persetujuan sedemikian. Ianya mengikut bahawa pihak ketiga kedua tidak boleh berhujah bahawa ia tidak bertanggungan untuk menggantirugi defendan disebabkan ia tidak bersetuju kepada penyelesaian yang berkaitan.

(3) Yang arif hakim tidak membuat sebarang dapatan berhubung pentafsiran dan skop Syarat ke 2 dan Memo A polisi di sini. Mahkamah-mahkamah telah mentafsirkan peruntukan-peruntukan seperti itu, pada hakikat dan sebahagian besarnya, sebagai bertujuan untuk mencegah tuntutan insurans berganda. Dalam rayuan semasa, Syarat ke 2 dan Memo A tersebut harus ditasfirkan sebagai terpakai kepada kes-kes di mana pengambil insurans yang sama telah mengambil dua polisi yang berbeza untuk melindungi halperkara dan risiko yang sama. Tidak dinafikan bahawa halperkara (barang-barang kepunyaan plaintif, iaitu lapan drum kabel) dan risiko (kemalangan) yang dilindungi oleh polisi yang diambil oleh plaintif dan defendan adalah sama. Namun, kepentingan yang dilindungi oleh polisi yang diambil oleh defendan adalah bagi memberi perlindungan kepada kehilangan atau kerugian kepada barang-barang sebagai pengangkut barang am (bailee), sementara kepentingan plaintif pula adalah bagi memberikan perlindungan kepadanya selaku pemilik barang-barang tersebut (bailor). Ianya mengikut bahawa kepentingan yang dilindungi oleh kedua-dua polisi adalah tidak sama.

(4) Defendan selaku bailee bertanggungan untuk menggantirugi plaintif selaku bailor nilai barang-barang yang rosak dalam kemalangan tersebut. Tidak diragukan bahawa plaintif telah mengambil polisinya sendiri untuk keselamatan dirinya sendiri dan bukannya untuk menanggungrugi defendan terhadap tuntutan plaintif. Walaupun plaintif telah ditanggungrugi oleh penanggung insuransnya sendiri, tiada halangan di sisi undang-undang mahupun ekuiti untuk penanggung insurans plaintif menggunakan haknya untuk mendakwa defendan atas nama plaintif melalui subrogasi. Defendan tidak harus diprejudis

semata-mata kerana plaintif, tanpa priviti defendan, telah mengambil satu lagi insurans bagi barang-barang tersebut. Adalah tidak adil dan tidak berekuiti untuk menghalang defendan dari manfaat-manfaat di bawah polisi berkenaan cuma kerana plaintif telah mengambil polisinya sendiri untuk melindungi barang-barang yang sama dengan sebuah syarikat insurans lain.

[Penghakiman untuk defendan atas tuntutan tanggungruginya terhadap pihak ketiga kedua untuk jumlah RM110,000 berserta faedah pada kadar 8% setahun.]

Case(s) referred to:

Castellain v. Preston & Ors [1882-83] Law Reports 11 QBD 380 ***(refd)***
Colonia Versicherung AG v. Amoco Oil Co [1997] 1 Lloyd's Rep 261 ***(refd)***
H Cousins & Co Ltd v. D & C Carriers Ltd [1971] 2 QB 230 ***(refd)***
Hall & Long v. The Railroad Companies [1871] Supreme Court of the United States, 13 Wall 367; 80 US 367; 20 L Ed 594; 1871 US Lexis 1348 ***(refd)***
Malaysian National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***
Mobile and Montgomery Railway Company v. LC Jurey and M Gillis, Partners as Jurey & Gillis, for the Use of the Factors' & Traders' Insurance Company of New Orleans [1883] United States Supreme Court Reports 28 ***(refd)***
North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company [1877] 5 Ch D 569 ***(refd)***
Petrofina Ltd v. Magnaload Ltd [1984] 1 QB 127 ***(refd)***
Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases [2006] 8 CLJ 364 HC ***(refd)***
Portavon Cinema Co v. Price and Century Insurance Co [1939] 161 LT 417 ***(refd)***
Post Office v. Norwich Union Fire Insurance Society Ltd [1976] 2 QB 363 ***(refd)***
Prudential Insurance Company v. Commissioners of Inland Revenue [1904] 2 KB 658 ***(refd)***
Randal v. Cockran [1748] English Reports 27 Chancery 1 Ves sen 99 ***(refd)***
The Distillers Company Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Company Ltd (1973-1974) 130 CLR ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 16 r. 1(2)

Other source(s) referred to:

Goff & Jones, *The Law of Restitution,* 5th edn, 1998, Chapter 8
Halsbury's Laws of England, 4th edn reissue, vol 16, paras 888-893
The Concise Oxford English Dictionary, 11th edn, p 1436

A *For the appellant/defendant - T Sagadaven; M/s Shearn Delamore & Co*
For the respondent/2nd third party - M Nagarajah; M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S1-23-41-1994]

Reported by Usha Thiagarajah

B

JUDGMENT

Abdul Malik JCA:

C

The Sole Issue

[1] There was only one issue for determination by this court and that was whether the respondent (Commercial Union Assurance (Malaysia) Sdn Bhd) was liable to make any payment to the appellant (Tiong Nam Trading & Transport (M) Sdn Bhd) under the Marine Goods-In-Transit/Carrier Liability Policy No: 05Q201582 MOC (hereinafter referred to as the "Carrier Liability Policy")? I would answer this question in the positive and I will now set out the reasons thereto. I must, however, put on record that I have read the judgment of my learned brother KN Segara, JCA and agree with the views which he held and has expressed.

D

E

Background Facts

F **[2]** Before the High Court *vide* civil suit no: S1-23-41-1994 (hereinafter referred to as "the High Court suit"), the plaintiff (Leader Cable Industry Berhad) brought an action against the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) for negligence and/or breach of contract entered into between the parties.

G

[3] The plaintiff (Leader Cable Industry Berhad) was and is, at all material times, manufacturers of telecommunication cables.

[4] While the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) was and is, at all material times, a transport company described as carriers and bailees of goods for hire and reward in the statement of claim.

H

[5] The defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) agreed to carry eight drums of the plaintiff's (Leader Cable Industry Berhad) telecommunication cables from Sungai Petani in Kedah to Bukit Kemuning in Klang, Selangor.

I

[6] It was a term of the agreement that the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) would exercise reasonable care and skill in the carriage of the telecommunication cables. The authorised driver of the motor lorry was Ramachandran Naidu a/l Abai Naidu – the first third party.

[7] The plaintiff (Leader Cable Industry Berhad) took an insurance coverage from Taisho Marine & Fire Insurance (M) Sdn Bhd to insure the telecommunication cables that were transported. That insurance coverage is called the Marine Cargo Policy No: PGD/CINT/93-001624.

[8] The defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) also took an insurance coverage, in consideration of the annual flat premium of RM150,000, from the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd). That insurance coverage was valid for the period from 28 February 1992 to 27 February 1993. As alluded to earlier, that insurance coverage is now referred to as the Carrier Liability Policy.

[9] On or about 10 February 1993, the defendant's (Tiong Nam Trading & Transport (M) Sdn Bhd) motor lorry whilst transporting the telecommunication cables belonging to the plaintiff (Leader Cable Industry Berhad) overturned at or along 14½ milestone, Jalan Cheras/Kajang, which resulted in the damage to the telecommunication cables belonging to the plaintiff (Leader Cable Industry Berhad).

[10] The plaintiff (Leader Cable Industry Berhad) sued the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) for negligence and/or breach of contract and sought for those damages as set out in the statement of claim at pp. 35 to 36 of the appeal record ("AR").

[11] The defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) denied liability and averred that they are entitled to an indemnity in full or to a contribution from the first third party (Ramachandran Naidu a/l Abai Naidu) who was the driver of the motor lorry at the material time and also from the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) who was the insurers for the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd), at the material time.

[12] When the High Court suit came up for hearing on 23 April 1998, the plaintiff (Leader Cable Industry Berhad) and the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) entered into a consent judgment for the sum of RM100,000 as damages with costs at RM10,000. As a result of the consent judgment, the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) withdrew its action against the first third party (Ramachandran Naidu a/l Abai Naidu).

[13] In regard to the action against the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) by the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd), the parties agreed not to call any witnesses and they also agreed to confine the dispute, principally, to the construction, application and scope of Condition "2" and Memo "A" dated 6 May 1992 as contained in the insurance policy issued by the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) to the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd).

[14] The High Court judge heard the arguments of the parties and he dismissed the defendant's (Tiong Nam Trading & Transport (M) Sdn Bhd) claim against the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd). Aggrieved by that decision, the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) appealed to this court.

Analysis

[15] The High Court judge went beyond the scope of merely construing Condition "2" and Memo "A" when he proceeded to consider whether there was liability on the part of the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) by interpreting the preamble to the Carrier Liability Policy.

[16] The preamble to the Carrier Liability Policy reads as follows (see p. 177 of "AR"):

> The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to owners of the goods carried by reason of the Assured becoming legally liable, as common carrier/ freight forwarder, for any claims or damages to the goods carried, where such liability is in consequence of matters arising from an accident during the period of this insurance, subject to the conditions and exclusions stated herein.

[17] In order to interpret the phrase "legally liable" as found in the preamble to the Carrier Liability Policy, the High Court judge relied on two authorities, namely:

(a) *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351, a decision of the then Supreme Court; and

(b) *Post Office v. Norwich Union Fire Insurance Society Ltd.* [1967] 2 QB 363, a decision of the English Court of Appeal.

[18] According to the High Court judge, the settlement that was reached between the plaintiff (Leader Cable Industry Berhad) and the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) required the consent of the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) based on the decision of the *Post Office*'s case. It was rather unfortunate that the High Court judge did not take into consideration the following state of affairs, namely:

(a) that the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) has repudiated the Carrier Liability Policy;

(b) that notwithstanding the repudiation, the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) has given due notice to the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) of the defendant's intention to settle the claim of the plaintiff (Leader Cable Industry Berhad); and

(c) that the second third party's (Commercial Union Assurance (Malaysia) Sdn Bhd) reply by way of a letter dated 22 April 1998 as seen at p. 187 of "AR" reflected the stand taken by the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) to the effect that there was never any policy liability, that the consent judgment was entirely the decision of the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd), that the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) reserved its rights under the Carrier Liability Policy to pursue its legal remedy; and that the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) be appraised of the terms of the settlement and be served with a copy of the consent judgment.

[19] Now, when interpreting the words "legally liable", the English Court of Appeal in the *Post Office*'s case did not impose a condition that the "agreement" between the insured and the injured party must be consented to by the insurance company. Moreover, unlike the present case, the insurance company in the *Post Office*'s case took the defence to the injured party's claim that there was an express condition in the policy requiring the consent of the insurance company. Here, in our case, there is no express condition in the Carrier Liability Policy requiring the consent of the insurance company (the second third party). Moreover, here, no such express condition requiring consent was ever relied upon by the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) before the High Court judge.

[20] Even the then Supreme Court in *Malaysian National Insurance Sdn Bhd v. Lim Tok (supra)* did not impose a condition that the settlement between the parties must be with the consent of the insurance company before an indemnity claim can be effected.

[21] Thus, there was no necessity for the consent judgment entered between the plaintiff (Leader Cable Industry Berhad) and the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) to receive the prior consent of the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) before the defendant could claim against the second third party.

[22] The efficacy of a consent judgment or a consent order has been set out by me, while sitting on the High Court bench in the case of *Phuah Beng Chooi & Ors v. Koh Heng Jin & Ors And Other Cases* [2006] 8 CLJ 364. There at p. 371, I had this to say:

> According to *'Blackstone's Guide To The Civil Procedure Rules'*, 2nd edn, at p 126:
>
> > A consent order must be drawn up in the terms that have been agreed, must be expressed to be 'by consent', and must be signed by the legal representatives of all parties (or, if approved by the court, any litigant in person) affected by the order. Letters sent to the court by the parties signifying their consent to a draft order are sufficient. The order is then filed with the court, which will arrange for it to be sealed, entered in the court records, and sent out to the parties.

[23] Continuing on the same page, I had this to say: A

According to the '*Words and Phrases Legally Defined*', 3rd edn under the general editorship of John B Saunders, the words 'consent order' carry the following connotations (see pp 314-315):

CONSENT ORDER B

There is a great deal of difference between a consent order in the technical sense and an order which embodies provisions to which neither party objects. The mere fact that one side submits to an order does not make that order a consent order within the technical meaning of that expression'. *Chandless-Chandless v. Nicholson* [1942] 2 KB 321 at 324, CA, per Lord Greene MR. C

The expression 'a consent order' may suggest some compromise or arrangement which might be inconsistent with the provisions of the Acts [Rent Restrictions Acts]. When the defendant is agreeing to submit to judgment because he is satisfied that the plaintiff can establish his right to an order under the Acts, it might be advisable to avoid the use of the word 'consent', which may have a wider meaning and cover cases where the 'consent' was the result of an arrangement which could not properly be made the basis of an order. *Thorne v. Smith* [1947] 1 All ER 39 at 44, CA, per Somervell LJ. D E

We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v. Nicholson, supra*. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties'. *Siebe Gormon & Co Ltd v. Pneupac Ltd* [1982] 1 All ER 377 at 380, CA, per Lord Denning MR'. F G H I

[24] And at p. 372 of the report, this was what I said:

> And the expression 'order by consent' has been defined in 'Malayan Law Journal Words And Phrases Judicially Defined' at p. 391 as follows:
>
> > Although an order by consent is not a contract, it is sufficient evidence of the contract upon which it is based, and such contract is not less a contract and subject to the incidents of a contract because there is superadded the command of a judge. (See *White Book* 1962, vol 1, p 2006.) In my view, this also applies to an interlocutory order obtained by consent. Since the present plaintiff is not personally a party to the consent order, it follows that he is not the proper party to apply for the declaration sought for in this case. (See *Mohamad Salleh v. Lau Siok Kee* [1974] 1 MLJ 102, FC.) Further, a judgment by consent is binding until set aside, and acts as an estoppel. (See *Kinch v. Walcott & Ors* [1929] AC 482.) Being a stranger to the judgment, the plaintiff has no right to set it aside in his personal capacity. *Kannappa Chettiar v. Vellasamy Pillai* [1977] 1 MLJ 255 at 256 per Mohamed Azmi J.
>
> The phrase 'consent judgment' in *'Black's Law Dictionary'*, 7th edn with Bryan A Garner as the editor-in-chief carries the following caption at p 300, 'See agreed judgment under judgment' and at p. 846, the words 'agreed judgment' has been defined to mean:
>
> > A settlement that becomes a court judgment when the judge sanctions it. – Also termed consent judgment; stipulated judgment.
>
> And at p 419 of the same dictionary, the expression 'consent decree' is defined as follows:
>
> > A court decree that all parties agree to. – Also termed consent order.
>
> The sum total of it all is this. That a consent order is binding and acts as an estoppel. According to *'Jowitt's Dictionary of English Law'*, 2nd edn, vol 1, by John Burke, the word 'consent' connotes the following salient features (see p 422):
>
> > Consent, an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things – a physical power, a mental power, and a free and serious use of them. Hence it is that if consent be obtained by

> intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

Continuing at the same page, the author states:

> In civil procedure, an order to which the parties consent cannot be appealed against except by leave (Judicature Act 1925, s. 31(1)(g)); but if the consent of any party is obtained by fraud or the like, the order may be set aside: in such a case there is in truth no consent. A consent may be withdrawn at any time before the order is perfected.

[25] So, the consent judgment entered between the parties cannot bar the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) from suing the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) under the Carrier Liability Policy.

[26] The insurance coverage taken by the plaintiff (Leader Cable Industry Berhad) are entirely different from that taken by the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd). They are two diametrically different policies. While the defendant's interest as a bailee is protected while conveying the telecommunication cables, the interest of the plaintiff as a bailor and as the owner of the telecommunication cables is also protected.

[27] According to the case of *North British and Mercantile Insurance Company v. London, Liverpool, and Globe Insurance Company* [1877] 5 Ch. D 569, CA and the case of *Hall & Long v. The Railroad Companies.* [1871] Supreme Court of the United States, 13 Wall. 367; 80 U.S. 367; 20 L. Ed.594; 1871 U.S. Lexis 1348, when goods which have been insured by their owner are lost or damaged, the insurers on payment are subrogated to the owner's remedy against any carrier, warehouseman or other bailee responsible for the safety of the goods. And they are, according to the case of *Mobile and Montgomery Railway Company v. L.C. Jurey and M. Gillis, Partners as Jurey & Gillis, for the Use of the Factors' & Traders' Insurance Company of New Orleans* [1883] United States Supreme Court Reports 28, Law. Ed U.S. 110-113, at 584-597, entitled to recover the whole loss from the carrier or bailee who is liable to the owner irrespective of the extent of their liability to the insured.

[28] According to Channell J in *Prudential Insurance Company v. Commissioners of Inland Revenue* [1904] 2 KB 658, 664, a contract of insurance may be defined in this way:

> A contract of insurance, then, must be a contract for the payment of a sum of money, or for some corresponding benefit such as the rebuilding of a house or the repairing of a ship, to become due on the happening of an event, …

[29] Put in another way, a contract of insurance arises when one party (the insurer) promises in return for a money consideration (the premium) to pay to the other party (the insured) a sum of money or provide him with some corresponding benefit, upon the occurrence of one or more specified events.

[30] Now, the terms and conditions of the Carrier Liability Policy between the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) and the second third party (Commercial Union Assurance (Malaysia) Sdn Bhd) cannot deprive the plaintiff's (Leader Cable Industry Berhad) insurer's right of subrogation which it acquired. Thus, although the plaintiff (Leader Cable Industry Berhad) has been indemnified by its own insurer, there is no restriction either in law or in equity, for the plaintiff's insurer to sue the defendant (Tiong Nam Trading & Transport (M) Sdn Bhd) in the plaintiff's name by way of subrogation.

[31] It must be borne in mind that the right of an insurer to be subrogated is not confined to claims which the insured may make in respect of the loss, but extends to all claims which, if satisfied, will diminish the loss. The *Concise Oxford English Dictionary* 11th edn defined the word "subrogation" at p. 1436 as:

> the substitution of one person or group by another in respect of a debt or insurance claim, accompanied by the transfer of any associated rights and duties.

[32] While *Goff & Jones, The Law of Restitution* (5th edn, 1998) Chapter 8; *Halsbury's Laws of England* (4th edn reissue) vol. 16 (Employment to Estoppel) at paras 888 to 893; Derham, Subrogation in Insurance Law [1985]; and Charles Mitchell, The Law of Subrogation (Oxford 1994) categorically defined the word "subrogation" to mean literally the substitution of one person for another.

[33] The doctrine of subrogation confers two distinct rights on the insurer after payment of a loss. Firstly, the insurer is to receive the benefit of all rights and remedies of the insured against third parties which, if satisfied, will extinguish or diminish the ultimate loss sustained (*Castellain v. Preston and Others* [1882-83] Law Reports 11 QBD 380, CA; and *H.Cousins & Co. Ltd. v. D. & C. Carriers Ltd.* [1971] 2 QB 230, CA). Secondly, the insurer is thus entitled to exercise, in the name of the insured, whatever rights the insured possesses to seek compensation for the loss from third parties.

[34] It is said that the right of an insurer to be subrogated is not confined to claims which the insured may make in respect of the loss, but extends to all claims which, if satisfied, will diminish the loss. In this context, I must refer to the case of *Castellain v. Preston and Others (supra)* and the facts there may be stated, briefly, as follows. The owner of a house contracted to sell his house which he had already insured. Before completion of the purchase, the house was destroyed by fire. The insurance company paid the vendor the amount of the loss and the purchase was subsequently completed with the result that the vendor received the full contract price from the purchaser. It was held that the insurers were entitled to recover the sum paid to their insured, the vendor. It was also held that the insurers were even entitled to exercise the vendor's lien as against the purchaser to enforce payment. Brett LJ writing a separate judgment had this to say at p. 388 of the report:

> Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated.

[35] What Brett L.J. was trying to say is this. That the contract of insurance is one of indemnity and indemnity only. It is upon that premise that his Lordship alluded to the right of subrogation.

[36] The insurer is also vested by the doctrine of subrogation to claim from the insured any benefit conferred on the insured by third parties with the aim of compensating the insured for the loss in respect of which the insurer has indemnified him (*Colonia Versicherung A.G. v. Amoco Oil Co.* [1997] 1 Lloyd's Rep. 261, CA, which applied *Randal v. Cockran* [1748] English Reports 27 Chancery 1 Ves. sen 99). This right is usually exercised by an insurer claiming from the insured a sum equivalent to any sum of damages paid to the insured by a third party legally liable for the loss.

[37] For the reasons adumbrated above, I too agree with my learned brother KN Segara, JCA that this appeal should be allowed with costs here and below. The consequential orders made by my learned brother KN Segara, JCA are adopted by me and I make those orders accordingly. This is a unanimous decision of this court.

KN Segara JCA:

[38] The plaintiff, Leader Cable Industry Berhad brought an action by way of a writ of summons and statement of claim dated 12 May 1994, in the High Court Kuala Lumpur (Civil Suit No S1-23-41-1994) against the defendant, Tiong Nam Trading & Transport (M) Sdn Bhd, for negligence and/or breach of contract.

[39] The plaintiff was at all material times a firm of manufacturers of low, medium and high power cables carrying on business, *inter alia*, at Tikam Batu Industrial Estate, Sungei Petani Kedah and at 60, Weld Quay Penang.

[40] The defendant, a private limited company, was at all material times a carrier and bailee of goods for hire and reward.

[41] By an oral agreement made on or about 9 February 1993 and in consideration of the carriage and other charges to be paid by the plaintiff, the defendant agreed to carry eight drums of the plaintiff's cables from the plaintiff's factory in Tikam Batu Industrial Estate, Sungei Petani, Kedah to the project site of Tenaga Nasional Berhad in Bukit Kemuning, Klang, Selangor. It was an implied term of the agreement that the defendant would exercise reasonable care and skill in or about the carriage of the

said cables. The defendant received the said cables on or about 9 February 1993, from the plaintiff at the plaintiff's factory and loaded them onto its motor lorry No WCM 5813. On or about 10 February 1993, at about 2.30am, the said motor lorry whilst being driven by the defendant's servant or agent along the 14 1/2 milestone Cheras/Kajang main road, overturned, and the said cables were damaged. By reason thereof the plaintiff suffered loss and damage and claimed a sum RM480,035.80 being:

a) the value of the eight drums of the said cables which were damaged beyond repair (RM509,506.80) less salvage (RM33,500), and

b) survey fees (RM4,029).

[42] Commercial Union Assurance (Malaysia) Sdn Bhd, in consideration of the annual flat premium of RM150,000 paid by the defendant, had issued a Marine Goods-In-Transit/Carrier Liability Policy No 05 Q201582 MOC in favour of the defendant for the period 28 February 1992 to 27 February 1993.

[43] The plaintiff had also taken out a separate Marine Cargo Policy No. PGD/CINT/93-001624 from Taisho Marine & Fire Insurance (M) Sdn Bhd, as the owner of the goods.

[44] The defendant issued a third party notice dated 31 July 1995, pursuant to O. 16 r. 1(2) of the Rules of High Court 1980 against the 1st third party (Ramachandran Naidu a/l Abai Naidu) and the 2nd third party (Comercial Union Assurance (Malaysia) Sdn Bhd, claiming:

(i) against the 1st named third party,

> an indemnity or alternatively such contribution thereto the plaintiff's claim and the costs of this action on the grounds that you have failed to exercise proper care and skill in transporting the Plaintiff's goods as agreed in your contract with the defendant.

and

(ii) against the 2nd named third party,

> an indemnity against the plaintiff's claim and the costs of this action on the grounds that you have wrongfully denied liability under the Marine Goods-In-Transit/Carrier's Liability Insurance Policy No: 05 Q201582 MOC taken out by the Defendant from you.

[45] After the statement of claim by the defendant against the 1st and 2nd third party had been issued and the respective defence and reply had been filed by all the parties, the trial of the said civil suit was fixed for hearing on 23, 24 and 29 April 1998 in the High Court, Kuala Lumpur.

[46] By letter dated 21 April 1998 the solicitors for the defendant informed the solicitors for the 2nd third party that the defendant is negotiating a settlement of the plaintiff's claim at RM100,000 (inclusive of interest) and RM10,000 as costs and made the following inquiries:

(a) whether the 2nd third party has any objections to the said settlement of the plaintiff's claim by the defendant;

(b) that the dispute between the defendant and the 2nd third party be confined to the interpretation of Condition 2 of the policy.

[47] By letter dated 22 April 1998 the solicitors for the 2nd third party replied to the solicitors for the defendant, *inter alia*, as follows:

(a) in respect of the defendant's intention to settle the plaintiff's claim, the 2nd third party maintained its stand that there is and never was any policy liability. Any intention to settle the plaintiff's claim is entirely a decision for the defendant to make. The 2nd third party reserved its rights under the policy;

(b) that the 2nd third party be fully appraised of the terms of the settlement and be served/ forwarded a copy of any settlement agreement/consent judgment between the plaintiff and the defendant;

(c) in the event the suit is settled between the plaintiff and the defendant, the hearing dates be vacated and the parties come to an agreed statement of facts and legal issues to be determined by the court;

(d) that the parties submit written submissions for the court's consideration instead of oral submissions.

[48] When the suit came up for hearing on 23 April 1998, the plaintiff and the defendant recorded a consent judgment for the sum of RM100,000 as damages and RM10,000 as costs. In respect of the third party proceedings, the defendant withdrew its

action against the 1st third party. In respect of the action against the 2nd third party, the parties agreed not to call any witnesses and also agreed to limit the dispute to the construction, application and scope of Condition 2 and Memo A, dated 6 May 1992, contained in the policy in question issued by the 2nd third party to the defendant.

[49] The learned trial judge of the High Court, after having considered the written and oral submissions, dismissed the defendant's claim against the 2nd third party. The defendant is dissatisfied and appealed against the decision. Hence, the present appeal before us.

[50] The issue in this appeal is whether the respondent was liable to make any payment to the appellant under the Marine Goods-In-Transit/Carrier Liability Policy No. 05 Q20158 MOC (hereinafter referred to as the "Carrier Liability Policy").

[51] In this judgment, the appellant and the respondent herein shall be identified as, "the defendant" and the "2nd third party", respectively.

[52] The defendant and the 2nd third party filed an agreed statement of facts dated 22 April 1999, in the High Court as follows:

1. The Defendant was and is at all material times operating as a **transporter of goods for hire.**

2. The 2nd Third Party is and was at all material times carrying on business as insurers.

3. In consideration of the **annual flat premium of RM150,000.00** paid by the Defendant, the 2nd Third Party had **issued** a Marine Goods-In-Transit/Carrier Liability Policy No. 05 Q201582 MOC in favour of the Defendant for the period 28.2.1992 to 27.2.1993 (hereinafter referred to as the Goods In Transit/**"Carrier Liability Policy"**)

4. The Plaintiff **had taken out a separate Marine Cargo Policy** No. PGD/cint/93-001624 from **Taisho Marine & Fire Insurance (M) Sdn Bhd** (hereinafter referred to as the "Marine Cargo Policy").

5. On or about 10.2.1993, the Defendant's motor lorry whilst transporting goods belonging to the Plaintiff overturned at or along the 14 1/2 milestone Jalan Cheras/Kajang.

A

6. As a result of the said accident, the goods belonging to the Plaintiff were damaged.

7. The **Plaintiff had been indemnified** by Taisho Marine and Fire Insurance Sdn Bhd in the sum of RM476,006.80 under the Marine Cargo Policy. **This suit is commenced by the Plaintiff** on behalf of Taisho Marine and Fire Insurance (M) Sdn Bhd **by way of subrogation**.

B

8. The Defendant submitted the claim to the 2nd Third Party under the **Carrier Liability Policy.** The 2nd Third Party has repudiated liability under Condition 2 of the said Policy.

C

9. On 23rd April, 1998 the Plaintiff and the Defendant entered into a consent judgment for the sum of RM100, 000.00 as damages (inclusive of interest) and RM10,000.00 as costs.

D

10. **The claim for an indemnity by the Defendant against the 2nd Third Party is disputed.** The Defendant and the 2nd Third Party **have agreed to confine the dispute to the construction and scope of Condition 2 of the Goods-In-Transit/Carrier Liability Policy and Memo A dated 6.5.1992** attached to the Goods-In-Transit /Carrier Liability Policy. (emphasis added)

E

[53] Condition 2 and Memo A of the policy referred to in para 10 above reads as follows:

CONDITIONS

F

…

2) It is a condition of this Policy that it shall not cover any property to the extent that it is directly or indirectly covered by other insurance (whether Fire, Marine or other policy or policies) whether prior to subsequent hereto or simultaneous herewith in date and by whomsoever effected, and this Company shall be liable for loss or damage covered hereunder only for the excess value beyond the **amount collectible from such other insurance, but not exceeding the** limits of liability set forth herein.

G

H

With effect from inception, the following Memo A is incorporated to the abovementioned policy and the Limits of Liability are amended to read as follows:

I

Memo A

If at the time of any occurrence or claim there is or but for the existence of this Policy would be any other policy of indemnity or insurance in favour of or effected by or on behalf of the Insured applicable to such occurrence or claim The Company shall not be liable under this Policy to indemnify the Insured in respect of such occurrence or claim except in so far as concerns any excess beyond the amount which would be payable under such other indemnity or insurance had this Policy not been effected.

Limits of Liability

a) M$100,000 any one conveyance and/or location for Goods-In-Transit Insurance.

b) M$100,000 any one conveyance and/or location for Carrier's Liability Insurance.

[54] Notwithstanding the agreement between the defendant and the 2nd third party to confine the dispute to the construction and scope of Condition 2 and Memo A of the carrier liability policy as unequivocally stated in para 10 of the agreed statement of facts (see above) the learned trial judge embarked, instead, to determine whether the defendant had become legally liable to the plaintiff for the damage to the goods of the plaintiff carried by the defendant, as common carrier, in order to hold the 2nd third party to make payment to the defendant by reason of the provision in the preamble or insuring clause of the carrier liability policy which reads:

> The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to owners of the goods carried by reason of the Assured becoming legally liable, as common carriers/... in consequence of matters arising from an accident during the period of this insurance ...

[55] On the factual matrix of this case, the learned trial judge's finding or reasoning that the defendant had not become "legally liable" to the plaintiff, notwithstanding the consent judgment, is totally flawed. This is what the trial judge said in his grounds of judgment:

A 6. It is not in dispute that the defendant and Commercial Union are the insured and insurer respectively under Marine Policy … (hereinafter referred to as "the said policy"). It is a liability policy as opposed to non-liability policy where default need not be proved. Under the terms and conditions of the said policy, the following is relevant:

B

> The Underwriters agree to *indemnify the Assured for any sum or sums paid by the Assured to owners of the goods carried by reason of the Assured becoming legally liable,* as common carrier/ freight forwarder, for any claims or damages to the goods
C carried, where such liability is in consequence of matters arising from an accident during the period of this insurance, subject to the conditions and exclusions stated herein. (emphasis added)

7. The words "legally liable" were equivalent to "responsible in
D law" and in the context of liability insurance, ordinarily means liability to pay a definite sum imposed by a final judgment against an insured or by an award or a settlement by way of an agreement (see *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351).

E 8. In *Post Office v. Norwich Union Fire Insurance Society Ltd* [1976] 2 QB 363, Lord Denning at page 373 said:

> The Policy says that "the company will indemnify the insured against all sums which the insured shall become legally liable to pay as compensation in respect of loss of
F or damage to property. It seems to me that the insured only acquires a right to sue for the money when his liability to the injured person has been established so as to give rise to a right of indemnity. *His liability to the injured person must be ascertained and determined to exist, either by judgment*
G *of the court or by an award in arbitration or by agreement.* Until that is done, the right to indemnity does not arise. I agree with the statement by Devlin J in *West Wake Price & Co. v. Ching*. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained loss.
H (emphasis added)

In this regard, with reference to the aforesaid judgment, the words 'by the judgment of the Court' and the words 'by agreement' are significant. In the case of the former, it refers to liability which is
I determined by the Court on merit at the end of full trial regarding the claim by the injured person against the insured. Whereas, in the case of the latter, it refers to a settlement reached between the insured and the injured person but with the consent of the insurer.

> 9. It is not in dispute that Commercial Union never agreed to the consent judgment entered into by the defendant and the plaintiff. That being so, based on ratio decidendi in *Post Office*'s case *(supra)*, Commercial Union cannot be said to be liable to indemnify the defendant. For the Court to rule otherwise, it could be construed as if the said policy is a non-liability policy. In the result, third party claim by the defendant against Commercial Union (the second third party) must fail.

[56] It is obvious that the trial judge has relied on:

– *Malaysian National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351 and

– *Post Office v. Norwich Union Fire Insurance Society Ltd* [1976] 2 QB 363;

to interpret the term "legally liable" found in the preamble or insuring clause of the said carrier liability policy.

[57] The learned trial judge has clearly misdirected himself in law when he concluded, "by agreement," it refers to 'a settlement reached between the insured and the injured person **but with the consent of the insurer**.' (emphasis in bold added)

[58] The Supreme Court in *Malaysia National Insurance Sdn Bhd v. Lim Tiok* did not impose a condition that the settlement between the parties must be with the consent of the insurer for any indemnity claim against the insurance company. The Supreme Court in that case stated:

> The expression 'legally liable' appearing in the policy has meaning equivalent to 'responsible in law' … However, when used in the context of liability insurance ordinarily means liability to pay a definite sum imposed by a final judgment imposed against an insured (see …), or by an award or a settlement by way of an agreement (see …). So also Shawcross, in his classic work on *Motor Insurance* (2nd Ed) at p 514, commenting on the phrase 'legally liable' appearing in a standard 'liability to third party clause' … says:
>
> > At first sight the words printed above might seem to suggest that insurers are only obliged to pay an indemnity in respect of a liability which has been transformed into a judgment debt (cf the provisions of s. 10 of the Road Traffic Act 1934, under which they are obliged to discharge such a liability directly to the third party (see …); in other

A words, that 'legally liable' (in other policies 'liable at law' and similar expressions are used) means liability which 'shall' after the accident 'become' established in a court of law. It is submitted, however, that this is not the meaning of this clause ... It follows that **the obligation to indemnify arises as soon as liability is incurred** (...) but the **obligation to pay** a sum of money **in discharge of the indemnity** does not **arise** until **the amount** thereof **is quantified** (**ie** the amount of compensation or damages due to the third party is **determined in one way or another,** eg by settlement with him or by judgment. (emphasis added)

The effect of a consent order or judgment was also discussed in *Malaysian National Insurance Sdn Bhd v. Lim Tiok*. The learned trial judge does not appear to have given any consideration to what was stated in the said Supreme Court case on the effect of a consent order notwithstanding the fact the third party claim before him centered on a consent judgment entered between the defendant and the plaintiff on 23 April 1998 for the sum of RM100,000 as damages and of RM10,000 as costs. The Supreme Court stated:

It was submitted by counsel for the insurer – and we agree – that in terms of efficacy, there is no distinction between a consent order and any other order of the court: see the case of *de Lasalla v. de Lasala* [1979] 2 All ER 1146 at p 1155, where Lord Diplock said this:

Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order, no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order.

Similarly, in *Palmer & Anor v. Durnford Ford (a firm) & Anor* [1992] 2 All ER 122, the Court had held that a consent order could give rise to a plea of res judicata, relying on *Cohen v. Jones* [1926] 1 KB 119 at p 125. Another case on the same point is *Re South American & Mexian Co, ex p Bank of England* [1895] 1Ch 37.

[59] We agree that it is obvious from the judgment of the Supreme Court in *Malaysia National Insurance Sdn Bhd v. Lim Tiok* that the obligation to indemnify the insured arises once the liability is incurred and the amount of compensation or the damages due to the third party is determined in one way or another.

[60] The learned trial judge has clearly misdirected himself in concluding that the settlement reached between the defendant and the plaintiff needed the consent of the 2nd third party based on the decision in the *Post Office*'s case. The English Court of Appeal in the *Post Office*'s case, when interpreting the words "legally liable", did not impose a condition that the 'agreement' between the insured and the injured party must be consented to by the insurance company before any liability can be imposed on the insurance company, on an indemnity claim against it. It is to be observed that the insurance company in the *Post Office*'s case took the defence to the injured party's claim that there is an express condition in the policy requiring consent of the insurance company. However, the learned trial judge fell in error when he failed to appreciate that the insurance company in the *Post Office*'s case relied on an express condition in the policy requiring the consent of the insurance company to any "agreement" between the insured and the injured. Under condition 3 of the relevant policy it stipulated that:

> No admission offer promise or indemnity shall be made or given by or on behalf of the insured without the written consent of the company which shall be entitled if it so desires to take over and conduct in the name of the insured the defence or settlement of any claim.

[61] In the present case, the learned trial judge misdirected himself when he failed to appreciate no such express condition requiring consent was relied upon by the 2nd third party at the hearing before him.

[62] In *The Distillers Company Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Company Ltd* (1973-1974) 130 CLR, the policy, inter-alia provided "to indemnify the Insured in respect of all sums for which he shall become legally liable arising out of …" and condition 2 required the consent of the insurance company to "make any admission, offer, promise or payment in connection with any accident or claim." Menzies J stated:

A The insured may make a reasonable settlement where the insurer breaches the contract by denying liability and refusing to defend or settle: see *General Omnibus Co. v. London General Insurance Co.* and the dictum of Lord Esher M.R. in *Captain Boyton's World's Water Show Syndicate Ltd. v. Employers' Liability Assurance Corporation Ltd.*

B

[63] The 2nd third party has not only denied policy liability prior to the commencement of the suit by the plaintiff but, on the eve of the hearing of the suit, by letter dated 22 April 1998 left the entire issue of the settlement of the plaintiff's claim to the
C defendant. The 2nd third party has agreed that on 10 February 1993 there was an accident involving the defendant's motor lorry carrying the plaintiff's goods and that as a result of the said accident the plaintiff's goods was damaged. The plaintiff's claim against the defendant is for the sum RM476,006.80. The plaintiff
D had agreed to accept a considerably lesser sum of RM100,000 as damages and RM10,000 as costs. A consent judgment was accordingly recorded on 23 April 1998. The settlement is reasonable compared with the true extent of the plaintiff's recoverable loss at RM476,006.80.

E

[64] We are of the opinion that the 2nd third party by denying policy liability and refusing to defend or settle the plaintiff's claim, cannot contend, in law, that it is not liable to indemnify the defendant since it did not consent to the settlement. In the
F circumstances, the defendant's claim against the 2nd third party must be allowed to prevail.

[65] The learned trial judge did not make any finding on the construction and scope of Condition 2 and Memo A dated 6 May
G 1992 of the carrier liability policy. The said Condition 2 and Memo A has already been set out in full in the earlier part of this judgment. Similar conditions, although not in *pari materia*, have been considered in the English courts and the courts have interpreted and construed that such provisions are in effect aimed
H primarily at preventing double insurance claims.

[66] The condition (condition No. 4) that was considered by Branson J in *Portavon Cinema Co. v. Price and Century Insurance Co.* [1939] 161 LT 417 reads as follows:

I

> This insurance does not cover any loss or damage or liability which at the time of the happening of such loss or damage or liability is insured by or would, but for the existence of this policy, be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such policy or policies had this insurance not been effected.

[67] This is what Branson J said, *inter alia*, in his judgment:

> I think it is necessary in the first place to say what in my view the meaning of condition 4 is. I do not think there is any real dispute as to that. If one looks at the language used without putting any restrictions upon the wideness of it, it might be urged that the existence of any other insurance of any other type covering the particular loss or liability, though taken out by a stranger and without the knowledge of the assured in question, would operate to bring that clause into effect; but I think it is quite clear upon the authorities that that cannot be said … I think the meaning is fairly dealt with in the passages which were cited from Macgillivray on Insurance … The particular passage is on p 874 of the second edition, and reads as follows: 'The clause designed to effect these objects appear in many different forms and with many variations in details, *but in construing them it is always important to remember that they are aimed primarily at double insurance, that is, at cases where the assured has made contracts with other insurers upon the same property and the same interests against the same risk,* and unless a condition contains words which compel a different construction it ought only to be applied to cases which are strictly cases of double insurance. (emphasis added)

[68] In *Petrofina Ltd. v. Magnaload Ltd* [1984] 1 QB 127 Lloyd J at p. 140 stated:

> The policy provides by general exception (2):
>
> > The insurer shall not be liable in respect of loss damage or liability which at the time of happening of such loss damage or liability is insured by or would but for the existence of this policy be insured by any other policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected.
>
> The defendants admit that at all material times they had in force liability policies with the Royal Insurance and other insurers. Some at least of these other policies have a provision similar in effect to general exception (2). Mr. Wright submits that the

existence of these other liability policies brings exception (2) into effect, with the result that the insurers are not liable at all, or only for the excess over the amounts covered by the other policies.

Mr. Hamilton submits that general exception (2) is, on its true construction, intended to take effect only in the case of true double insurance. There cannot be double insurance unless the same insured is covered in respect of the same property against the same risks. Thus if in the present case there were, in addition to the New Hamphire policy, another policy on the contract works, covering the same risks, then that would be a true case of double insurance. But here the other policies, so Mr. Hamilton submits, are not policies on property, but liability policies. Mr. Hamilton argues that there cannot be double insurance in those circumstances.

I agree with Mr Hamilton's argument …

The insurances are not therefore insurances on the same property and against the same risk and it follows that there is here no possibility of double insurance in the true sense, and general exception (2) does not apply.

[69] Therefore, in the present appeal before us, the said Condition 2 and Memo A must be interpreted to apply to cases where the same insured had taken out two different policies to cover the same subject matter and risk. It is not disputed that the subject matter (goods belonging to the plaintiff, that is, eight drums of cable) and the risk (accident) covered by the policy taken out by the plaintiff and the defendant are the same. The interest covered by the policy taken out by the defendant is to provide cover for loss or damage to goods as common carrier (bailee) whereas the plaintiff's interest in the policy taken out by it is to provide cover as owners of the goods (bailor).Therefore, the interests covered by the two policies are not the same.

[70] The defendant, as bailee, was liable to compensate the plaintiff, as bailor, the value of the goods damaged in the accident. There can be no dispute that the plaintiff had taken its own policy for its own security and not to indemnify the defendant against the claim of the plaintiff. Although the plaintiff has been indemnified by its own insurer, there is no bar in law or equity, for the plaintiff's insurer from availing itself of the right to sue the defendant in the plaintiff's name, by way of subrogation.

[71] The terms and conditions of the contract of insurance (that is, the carrier liability policy) between the defendant and the 2nd third party cannot deprive the plaintiff's insurer's right of subrogation which it acquired or make it liable to contribute anything which it was not otherwise liable as between itself and the plaintiff and the defendant. The defendant should not be prejudiced by the mere fact that the plaintiff without the defendant's privity had been minded to effect another insurance upon the said goods.

[72] We are unanimous that the 2nd third party cannot rely on Condition 2 and Memo A of the said carrier liability policy to repudiate liability, especially so, since it cannot be said that the defendant was in breach of the said condition. It would be unjust and inequitable to deprive the defendant of the benefits under the said carrier liability policy purely because the plaintiff had taken out its own policy to cover the same goods with another insurance company.

[73] We are unanimous that this appeal be allowed with costs here and below. There shall be judgment for the appellant's claim for an indemnity against the respondent in the sum of RM110,000 together with interest at 8% per annum from 24 April 1998 to the date of full payment.

[74] Deposit to be refunded to appellant.